(2)

No. 90-1156

Supreme Court, U.S.
FILED
FEB 11 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

JOHN G. ROBERTS, JR.
Acting Solicitor General
LAWRENCE G. WALLACE
Deputy Solicitor General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM S. SCHERMAN
General Counsel
JEROME M. FEIT
Solicitor
TIMM L. ABENDROTH
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Whether *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), require a state or local public utility commission to allow an electric utility to recover, in retail rates, its share, as determined by the Federal Energy Regulatory Commission, of the costs of an electric power generating facility that supplies power to the utility and sister utilities in three other States.

TABLE OF CONTENTS

	Page
Interest of the United States and the Federal Energy Regulatory Commission	1
Statement	2
Discussion	11
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Burford v. *Sun Oil Co.*, 319 U.S. 315 (1943)	4
Colorado River Water Conservation Dist. v. *United States*, 424 U.S. 800 (1976)	8
FPC v. *Southern Cal. Edison Co.*, 376 U.S. 205 (1964)	14
Kentucky-West Virginia Gas Co. v. *Pennsylvania Pub. Utilities Comm'n*, 837 F.2d 600 (3d Cir. 1988)	10
Middle South Energy, Inc.:	
26 F.E.R.C. ¶ 63,044 (1984)	16
31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425 (1985), aff'd *sub nom. Mississippi Indus.* v. *FERC*, 808 F.2d 1525, reh'g granted and vacated in part, 822 F.2d 1103 (D.C. Cir.), cert. denied, 484 U.S. 985 (1987), on remand *sub nom. System Energy Resources, Inc.*, 41 F.E.R.C. ¶ 61,238, aff'd, 42 F.E.R.C. ¶ 61,091 (1988), aff'd *sub nom. City of New Orleans* v. *FERC*, 875 F.2d 903 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 1805 (1990)	3, 14
Mississippi Power & Light Co. v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988)	2, 6, 9, 10, 11, 12, 13, 14, 15, 16

Cases—Continued: Page

Moses H. Cone Memorial Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 8
Nantahala Power & Light Co. v. *Thornburg*, 476 U.S. 953 (1986) 2, 6, 10, 11, 13, 14, 16
New England Power Co., 31 F.E.R.C. ¶ 61,047 (1985), aff'd, 800 F.2d 280 (1st Cir. 1986) 12
New Orleans Public Service, Inc. v. *Council of New Orleans*, 109 S. Ct. 2506 (1989) 2, 3, 7, 9, 10, 15, 16
NOPSI v. *City of New Orleans*, 782 F.2d 1236, modified, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987) 4
NOPSI v. *Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987) 5
NOPSI v. *Council of New Orleans*, 850 F.2d 1069 (5th Cir. 1988) 6
NOPSI v. *Council of New Orleans*, No. 88-4511 (Civ. Dist. Ct., Parish of Orleans, La. Nov. 19, 1989) 7
Pike County Light & Power Co. v. *Pennsylvania Pub. Utility Comm'n*, 77 Pa. Commw. 268, 465 A.2d 735 (1983) 10
Younger v. *Harris*, 401 U.S. 37 (1971) 6

Statutes and regulations:

Federal Power Act, 16 U.S.C. 824 *et seq.* 1
16 U.S.C. 824(b) 3
16 U.S.C. 824d(a) 1
Johnson Act, 28 U.S.C. 1342 4
La. Rev. Stat. Ann. (West 1988):
§ 33:4405 3
§ 33:4495 3

Statutes and regulations—Continued: Page

Home Rule Charter of the City of New Orleans § 4-1604 (1986) 3
Ordinance No. 8264 M.C.S. Ordinance No. 10340 M.C.S. 3

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1156

NEW ORLEANS PUBLIC SERVICE, INC., PETITIONER

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND
THE FEDERAL ENERGY REGULATORY COMMISSION
AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Part II of the Federal Power Act, 16 U.S.C. 824 *et seq.*, gives FERC exclusive regulatory authority over the wholesale sale and the transmission of electric energy in interstate commerce. FERC is responsible for ensuring that all rates or charges made, demanded, or received by a public utility for or in connection with the transmission or sale of electric energy in interstate commerce are "just and reasonable." 16 U.S.C. 824d(a). This case was preceded by FERC's decision, upon examination of the justness and reasonableness of two agreements filed with FERC by members of a four-state public utility holding company system, that the four operating companies of the system

shall purchase the capacity of a particular nuclear power plant owned by the system in proportions deemed just and reasonable by FERC. The court of appeals held in this case that the Council of the City of New Orleans may prohibit the system operating company serving customers in that city from recovering a substantial portion of the FERC-determined costs after finding that that portion was not prudently incurred by the operating company. If allowed to stand, the court of appeals' decision would effectively nullify FERC's allocation of costs among the four operating companies. FERC participated as amicus curiae in *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), and in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988), because the decisions of the state supreme courts in those cases similarly threatened to nullify an exercise of FERC's exclusive statutory authority. [1]

STATEMENT

1. Petitioner, New Orleans Public Service, Inc. (NOPSI), is one of four operating electric utility companies that are wholly owned subsidiaries of Middle South Utilities, Inc. (MSU). See generally *Mississippi Power & Light Co.*, 487 U.S. at 357-360. The other subsidiaries, each of which sells electric power to its own local customers, are Louisiana Power & Light (LP&L), Mississippi Power & Light Company (MP&L), and Arkansas Power & Light Company (AP&L). A generating subsidiary, Middle South Energy (MSE), was formed to own and finance two nuclear power

[1] FERC also participated as amicus curiae when this case was previously before the Court on an abstention issue in *New Orleans Public Service, Inc.* v. *Council of New Orleans*, 109 S. Ct. 2506 (1989) (*NOPSI*).

plants, Grand Gulf 1 and 2, and to sell power from those plants to the operating companies. Pet. App. 3A-4A.

In June 1985, the Federal Energy Regulatory Commission approved wholesale rates for power from Grand Gulf 1 and allocated its capacity and energy among the four operating companies. See *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305, on reh'g, 32 F.E.R.C. ¶ 61,425 (1985), aff'd *sub nom. Mississippi Indus.* v. *FERC*, 808 F.2d 1525, reh'g granted and vacated in part, 822 F.2d 1103 (D.C. Cir.), cert. denied, 484 U.S. 985 (1987), on remand *sub nom. System Energy Resources, Inc.*, 41 F.E.R.C. ¶ 61,238, aff'd, 42 F.E.R.C. ¶ 61,091 (1988), aff'd *sub nom. City of New Orleans* v. *FERC*, 875 F.2d 903 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 1805 (1990). FERC rejected respondent New Orleans City Council's argument that NOPSI's share of Grand Gulf 1 costs should be 9 percent. FERC instead concluded that the operating companies should share in the system's total investment in nuclear capacity "roughly in proportion to each company's share of System demand." 31 F.E.R.C. at 61,655-61,656. FERC ordered the following allocation of Grand Gulf 1 costs: AP&L, 36 percent; LP&L, 14 percent; MP&L, 33 percent; and NOPSI, 17 percent. *Ibid.* MSE has accordingly billed NOPSI for 17 percent of the costs since Grand Gulf 1 went into service on July 1, 1985. Pet. App. 5A-6A.

Respondent, the City Council of New Orleans, regulates NOPSI's retail rates.[2] On May 17, 1985, NOPSI applied for a retail rate increase to reflect the Grand Gulf 1 costs that it would be required to pay under the FERC allocation. The Council, however, refused to allow NOPSI to

[2] See 16 U.S.C. 824(b); La. Rev. Stat. Ann. §§ 33:4405, 33:4495 (West 1988); Home Rule Charter of the City of New Orleans § 4-1604 (1986), as amended by Ordinance No. 8264 M.C.S., as amended by Ordinance No. 10340 M.C.S.; see also *NOPSI*, 109 S. Ct. at 2511.

recover its Grand Gulf 1 costs in retail rates. Pet. App. 3A, 6A-7A.

2. a. *NOPSI I*: In July 1985, the Council initiated a public hearing in order to determine "the legality and prudency [*sic*] of [NOPSI's contracts relating to Grand Gulf 1, and] the prudency and reasonableness of the said expenses." Council Res. R-85-423. NOPSI responded in August 1985 by filing a complaint in federal district court seeking declaratory and injunctive relief. NOPSI asked the court to issue preliminary and permanent injunctions enjoining the Council from denying NOPSI recovery, through its retail rates, of its FERC-allocated share of the expenses of Grand Gulf 1. Pet. App. 6A-7A.

In September 1985, the district court granted the Council's motion to dismiss, holding that dismissal was warranted under the Johnson Act, 28 U.S.C. 1342, and under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).[3] On appeal, the court of appeals initially reversed both aspects of the district court's ruling, but on its own motion for reconsideration later reversed itself on the abstention issue. See *NOPSI* v. *City of New Orleans*, 782 F.2d 1236, modified, 798 F.2d 858 (5th Cir. 1986), cert. denied, 481 U.S. 1023 (1987).[4]

b. *NOPSI II*: While *NOPSI I* was pending before the court of appeals, the Council announced in October 1985 that it would conduct a prudence investigation into NOPSI

[3] In the meantime, the Council had denied NOPSI's request for interim rate relief. Council Res. R-85-5261.

[4] While the district court's ruling was pending on appeal, the Council and NOPSI entered into a settlement agreement concerning the treatment of Grand Gulf 1 costs. See Council Res. R-86-112. The agreement set out in detail the amounts by which NOPSI could increase its rate base annually until the costs of Grand Gulf 1 were fully recovered. Under the agreement, NOPSI also agreed permanently to absorb $51.2 million of the costs. Both sides purported to reserve their legal rights, including the Council's right to investigate the issue of prudence. See Council Res. R-86-112, at 4, 11-12.

expenditures on Grand Gulf 1. Council Res. R-85-636.[5] In November 1985, NOPSI filed a second lawsuit in federal district court in which it sought to enjoin the investigation. NOPSI later amended its complaint to seek an injunction or a declaratory judgment only to the extent that the Council proposed taking any action to require NOPSI or its shareholders to absorb all or a portion of the cost of Grand Gulf 1 allocated to NOPSI by FERC. Pet. App. 7A.

In December 1986, the district court dismissed NOPSI's complaint on ripeness grounds, and in the alternative abstained. Pet. App. 7A. On appeal, the court of appeals affirmed the judgment on the ripeness issue. *NOPSI* v. *Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987).

3. a. *NOPSI III*: In February 1988, the Council issued a rate order based on its completed prudence inquiry. The Council found: (1) NOPSI's "oversight and review of its Grand Gulf obligation as the project went forward was uncritical and severely deficient," R.E. 32;[6] (2) NOPSI "made no effort to reduce its risk exposure" in the wake of the Three Mile Island Nuclear incident in 1979-80, R.E. 33; and (3) NOPSI imprudently failed to reduce the risk of its Grand Gulf commitment by "selling all or part of its share off-system," R.E. 33. Based on these findings, the Council disallowed $135 million of NOPSI's deferred Grand Gulf

[5] As the court below noted:

> The resolution specifically provided that, in determining the appropriate retail rate increase, the Council would not seek to invalidate any of the agreements surrounding Grand Gulf 1 or to order NOPSI to pay MSE a wholesale rate other than that approved by FERC.

Pet. App. 7A.

[6] "R.E." refers to the Record Excerpts filed with NOPSI's brief in the court of appeals.

costs and required NOPSI to deduct that amount from its rate base. R.E. 34-35.[7]

NOPSI then filed the instant action in federal district court, seeking a declaratory judgment and both preliminary and permanent injunctive relief from the Council's order. NOPSI contended that federal law preempted that order. See *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986). In March 1988, the district court dismissed NOPSI's complaint, holding that abstention under both *Burford* and *Younger* v. *Harris*, 401 U.S. 37 (1971), was appropriate.[8] In July 1988, the court of appeals affirmed. *NOPSI* v. *Council of New Orleans*, 850 F.2d 1069 (5th Cir. 1988).[9]

---

[7] In order to reflect the disallowance, the Council also reduced rate increases then planned for NOPSI. The Council explained, however, that the amount disallowed did not reflect the full extent of NOPSI's imprudence, because that amount would have caused NOPSI to become insolvent. The Council had instead disallowed only that amount – minus an additional ten percent "buffer" – that it concluded NOPSI could absorb without becoming insolvent. R.E. 34-35.

[8] In June 1988, this Court issued its decision in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988). There, the Court held that the underlying FERC allocation proceedings at issue here preempted a prudence inquiry by the Mississippi Public Service Commission regarding MP&L's payments for Grand Gulf costs. *Id.* at 369-377.

[9] NOPSI had also filed a complaint (petition of appeal) in state court, seeking relief against the Council's order based on several state and federal grounds (later amended to include the federal preemption contention). *NOPSI* v. *Council of New Orleans*, No. 88-4511 (Civ. Dist. Ct., Parish of Orleans, La. filed Mar. 7, 1988). NOPSI's state action was later consolidated with a declaratory judgment action filed earlier by the Council, seeking a declaration that the Council's rate order represented a just and reasonable exercise of the Council's power and that NOPSI's failure to comply with the order would be unlawful, *Boissiere* v. *Cain*, No. 88-2503 (Civ. Dist. Ct., Parish of Orleans, La. filed Feb. 4, 1988), and with a suit filed by a local consumers' rights organization, seeking to force the Council to disallow more of the Grand Gulf costs, *Alliance for Affordable Energy, Inc.* v. *Council of New Orleans*, No. 88-2502 (Civ. Dist. Ct., Parish of Orleans, La. filed Feb. 4, 1988).

In November 1989, the state trial court rejected the challenges raised by NOPSI and others and therefore sustained the Council's order in its entirety. *NOPSI* v. *Council of New Orleans*, No. 88-4511 (Civ. Dist. Ct., Parish of Orleans, La., Nov. 19, 1989). NOPSI's appeal of the trial court's judgment is pending before a state appellate tribunal. See *NOPSI* v. *Council of New Orleans*, No. 90-CA-0420 (4th Cir. La. Ct. App.) (argued Nov. 7, 1990).

b. In June 1989, this Court reversed and remanded for further proceedings, holding abstention improper under either *Burford* or *Younger*. *New Orleans Public Service, Inc.* v. *Council of New Orleans*, 109 S. Ct. 2506 (1989) (*NOPSI*). In particular, the Court concluded that abstention under *Burford* was not warranted where, as here, "no inquiry beyond the four corners of the Council's retail rate order is needed to determine whether it is facially pre-empted by FERC's allocative decree and relevant provisions of the Federal Power Act." *NOPSI*, 109 S. Ct. at 2515. Similarly, the Court concluded that abstention was inappropriate with respect to NOPSI's alternative claim, namely, "that the rate order's nominal emphasis on NOPSI's failure in 1979-1980 to diversify its power supply by selling off a portion of its Grand Gulf allocation was merely a cover for the determination that the original Grand Gulf investment was itself unwise." *Ibid.*[10]

c. On remand before the district court, NOPSI renewed its claims that federal law preempted the Council's order.

---

[10] With respect to abstention under *Younger*, the Court concluded:

> Viewed, as it should be, as no more than a state-court challenge to completed legislative action, [NOPSI's] Louisiana suit comes within none of the exceptions that *Younger* and the later cases have established.

109 S. Ct. at 2520.

NOPSI first contended that the order "on its face * * * impermissibly contradicted the FERC order," and in the alternative, "that the Council's reasons for denying a pass-through were a pretext to attack the FERC allocation." Pet. App. 8A.

In January 1990, the district court rejected NOPSI's claims and therefore stayed further proceedings pending completion of parallel state court litigation. Pet. App. 26a-32A; see note 9, *supra*. The court held that "[f]acially, the Council's Order is not preempted by federal law." Pet. App. 26A. As the court explained:

> An examination into the "four corners" of the Council's Order reveals that it is not facially preempted. The Council's decision did not question the validity of FERC's allocative decree, and the Council did not attempt to regulate interstate utility rates. Instead, the Council's inquiry focused solely upon whether NOPSI prudently managed its participation in Grand Gulf.

Id. at 27A. With respect to the remainder of the case, which the court described as "NOPSI's claim that the Council's Order is unsupported by the evidence," *ibid.*, the court stayed further proceedings under the principles set forth in *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983), and *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976). Pet. App. 27A-32A.

4. In August 1990, the court of appeals affirmed. Pet. App. 2A-24A. As a threshold matter, the court recognized that "*Nantahala* and *Mississippi Power and Light* reaffirmed the well-established principle that if FERC has jurisdiction over a subject, states cannot have jurisdiction over it." *Id.* at 15A-16A. The court further noted that the latter decision

> established that FERC had jurisdiction to determine whether the various utilities acted prudently in deciding

> to participate in the Grand Gulf venture, and that the states were therefore precluded from conducting prudence inquiries on that subject.

Id. at 16A. This case, the court determined, "presents a variation of that question," *i.e.*, "whether FERC has jurisdiction to determine whether NOPSI acted prudently once the Grand Gulf project was underway." *Ibid.*[11]

Turning to that question, the court first concluded that "it is plain that FERC did not assert jurisdiction to determine NOPSI's prudence in not acting to minimize its losses." Pet. App. 16A. The court next determined that "this is [not] a matter that Congress has nevertheless committed to FERC's exclusive jurisdiction." *Id.* at 17A. As the court pointed out,

> finding such jurisdiction would work the result Justice Brennan feared in *Mississippi Power and Light*, that is, to "divest states of authority to determine the prudence of costs incurred by retail utilities whenever those utilities belong to an interstate pool."

Ibid. (quoting *Mississippi Power & Light Co.*, 487 U.S. at 391 (Brennan, J., dissenting)). Finally, the court explained that "[i]f states may deny pass throughs because costs have gone down in other areas, it seems logical that they should be able to deny them because costs would have gone down if the utility had not been imprudent." Pet. App. 18A (citing

---

[11] The court of appeals pointed out that in *NOPSI*, 109 S. Ct. at 2517, this Court had characterized the Council's order as follows:

> [T]he Council maintains that it has examined the prudence of NOPSI's failure, after the risk of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking step of making NOPSI's shareholders rather than the ratepayers bear the consequences.

Pet. App. 15A.

Nantahala, 476 U.S. at 968). Accordingly, the court held that the Council's order "is not facially preempted." Pet. App. 18A.[12]

With respect to NOPSI's pretext claim, the court of appeals concluded that, in light of the Court's observations in *NOPSI*, 109 S. Ct. at 2512 n.2, "the pretext claim is inevitably a review of the sufficiency of the evidence to support the Council's stated reasons for denying the pass through." Pet. App. 21A. The court therefore stated that, "[i]f there is an adequate basis in the record to support the Council's action, federal courts may not invalidate it on a suspicion that the Council members' motives were improper." *Ibid*. The court rejected NOPSI's contention that a further inquiry was required, holding that the "pretext claim has little functional difference from the state court's sufficiency of the evidence review, and motivation is not relevant." *Id*. at 22A. In these circumstances, the court of appeals concluded, the district court had not abused its discretion in staying further proceedings on NOPSI's pretext challenge pending completion of the parallel state court litigation, since there were "no substantial federal questions remaining in the case." *Id*. at 24A.

---

[12] The court correctly acknowledged, however, that the so-called "*Pike Co.*" exception to FERC's exclusive wholesale jurisdiction – when a utility imprudently purchases unnecessary quantities of high-cost power at FERC-approved rates – was inapplicable. Pet. App. 15A; see, *e.g.*, *Kentucky-West Virginia Gas Co. v. Pennsylvania Pub. Utilities Comm'n*, 837 F.2d 600 (3d Cir. 1988); *Pike County Light & Power Co. v. Pennsylvania Pub. Utility Comm'n*, 77 Pa. Commw. 268, 465 A.2d 735 (1983). That exception does not apply where, as here, FERC has determined the amount of power that each operating utility in the interstate pool was obligated to purchase. See *Mississippi Power & Light Co.*, 487 U.S. at 373-374.

DISCUSSION

The decision of the court of appeals is inconsistent with the Court's decisions in *Mississippi Power & Light Co.* and *Nantahala*. As the Court expressly reaffirmed in *Mississippi Power & Light Co.*,

> "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price. . . . Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable."

487 U.S. at 373 (quoting *Nantahala*, 476 U.S. at 965, 966). In the FERC proceedings here, in which the Council participated, FERC determined the wholesale price to be paid by NOPSI for power it acquires: FERC ruled that NOPSI, which draws all of its power from a variety of sources within the MSU system, should purchase 17 percent of the power of Grand Gulf 1. FERC's authority to impose this obligation and associated costs on NOPSI was affirmed by the D.C. Circuit and reduced to final judgment. See p. 3, *supra*. The decision below, barring NOPSI from passing a substantial portion of the costs of purchasing its share of Grand Gulf 1 power on to its customers and therefore forcing those costs to be paid instead by its parent or shareholders, would, if allowed to stand, effectively nullify a FERC decision in which the Council fully participated.

The court of appeals justified its conclusion on the ground that FERC does not have – and did not purport to exercise – exclusive "jurisdiction to determine whether NOPSI acted prudently once the Grand Gulf project was underway." Pet. App. 16A. The court therefore determined that the Council may, consistent with federal law, "conduct[] prudence inquiries on that subject." *Ibid*. The Court's decisions in *Mississippi Power & Light Co.* and *Nantahala*

foreclose that argument. First, the so-called "prudency" review traverses matters squarely within the exclusive jurisdiction of FERC. Second, this is a case like *Mississippi Power & Light Co.* and *Nantahala*, where all the relevant sources of electric power are within the utility system and the sole question—one that only FERC can properly and fairly resolve—is how the benefits and burdens of those sources should be shared between affiliated companies doing business in different States.

1. First, contrary to the court of appeals' assumption, the Council has no jurisdiction to decide that NOPSI imprudently participated in the Grand Gulf 1 project and that NOPSI (and MSU) and their shareholders must therefore bear some of the project's costs. The question whether MSU and its subsidiary MSE, which owns Grand Gulf 1, may charge the operating companies the full costs of Grand Gulf 1 as part of the price of the power that facility supplies to them is a question of the justness and reasonableness of the terms of interstate wholesale transactions in electric power, and it is within the exclusive jurisdiction of FERC. FERC had jurisdiction to consider the argument that Grand Gulf 1 costs were imprudently incurred and should not be passed through to operating utilities that are, for this purpose, wholesale customers. As this Court recognized, however, "[t]he question of prudence was not discussed * * * because no party raised the issue, not because it was a matter beyond the scope of FERC's jurisdiction." *Mississippi Power & Light Co.*, 487 U.S. at 375.[13]

[13] If FERC had found that decisions relating to the Grand Gulf 1 project were imprudent, FERC could have determined that it was not just and reasonable for MSU and MSE to charge the four operating utilities, including NOPSI, the full cost of Grand Gulf 1 power. In that circumstance, MSU's shareholders would have had to absorb those costs. See *New England Power Co.*, 31 F.E.R.C. ¶ 61,047, at 61,084 (1985), aff'd, 800 F.2d 280 (1st Cir. 1986). Indeed, the Court expressly recognized this point in *Mississippi Power & Light Co.* See 487 U.S. at 375.

FERC determined that the full costs should be borne by the operating companies such as NOPSI in specified proportions. This Court's pronouncement in *Mississippi Power & Light Co.* squarely applies to the Council's efforts at issue here:

> [The Council] may not enter an order "trapping" the costs [NOPSI] is mandated to pay under the FERC order allocating Grand Gulf power or undertake a "prudence" review for the purpose of deciding whether to enter such an order.

487 U.S. at 372.[14] As this Court has made plain,

> a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.

Id. at 373 (quoting *Nantahala*, 476 U.S. at 966).

At bottom, as this Court has recognized, "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order." *Mississippi Power & Light Co.*, 487 U.S. at 375. Here, the Council's "prudency" review and resulting order

[14] As in *Mississippi Power & Light Co.*, "[i]t is clear that the only purpose of the prudence review ordered by the [Council] was to determined whether the costs FERC had directed [NOPSI] to pay for its allocation of Grand Gulf power should be 'trapped' or passed on to [NOPSI's] retail customers." 487 U.S. at 372 n.12.

amount to precisely that sort of impermissible collateral attack on FERC's allocation of Grand Gulf costs.[15]

Second, the court of appeals erred in attaching any significance to its view that "FERC did not assert jurisdiction to determine NOPSI's prudence in not acting to minimize its losses." Pet. App. 16A. As an initial matter, the court's view is factually inaccurate. Indeed, this Court recognized as much in *Mississippi Power & Light Co.*, 487 U.S. at 376.[16] In any event, this Court has "long rejected this sort of 'case-by-case analysis of the impact of state regulation upon the national interest' in power regulation cases." *Id.* at 374 (quoting *Nantahala*, 476 U.S. at 966, and *FPC* v. *Southern Cal. Edison Co.*, 376 U.S. 205, 215-216 (1964)). As the Court further emphasized just three Terms

[15] For these reasons, the court of appeals erred (Pet. App. 17A) in relying on the concern cited by Justice Brennan in *Mississippi Power & Light Co.*, 487 U.S. at 391 (Brennan, J., dissenting), namely, that the States' authority to determine the prudence of retail utility members of interstate pools would be divested if FERC undertakes that sort of inquiry. Justice Brennan based such a concern on his conclusion that FERC does not have jurisdiction over the prudence of a pool member's purchase decision. See *id.* at 384-390. This Court, however, held to the contrary. See *id.* at 374-376 (opinion of the Court); *id.* at 377-383 (Scalia, J., concurring in the judgment).

[16] FERC did consider the prudence issue in determining the appropriate allocation of the capacity and costs of Grand Gulf 1 among the four operating companies. FERC found that Grand Gulf 1 was part of a reasonable system plan to diversify the fuel base by developing nuclear power to meet anticipated growth in demand, but that the system experienced "unexpectedly dramatic" increases in the costs of the facility. 31 F.E.R.C. at 61,654-61,655. FERC also explicitly affirmed and adopted the findings and conclusions of its administrative law judge who determined that MSU's decisions both to begin and to complete construction of Grand Gulf 1 were prudent. See 26 F.E.R.C. at 65,112-65,113; 31 F.E.R.C. at 61,655, 61,666.

ago in *Mississippi Power & Light Co.*, where it reviewed the same FERC allocation decision underlying this case:

> States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable. FERC's jurisdiction to adjust the allocation of Grand Gulf power [among the operating utilities] has been established. Mississippi, therefore, may not consistent with the Supremacy Clause conduct any proceedings that challenge the reasonableness of FERC's allocation.

487 U.S. at 374. For those reasons, as in *Mississippi Power & Light Co.*, the Council here "cannot evaluate * * * the prudence of [NOPSI's] decision to be a party to agreements to construct and operate Grand Gulf without traversing matters squarely within FERC's jurisdiction." *Id.* at 376. In sum, contrary to the court of appeals' view, there are not two separate and distinct prudence inquiries in this case—one for FERC and the other for state regulatory bodies such as the Council. Rather, as this Court recognized in *Mississippi Power & Light Co.*, there is only one broad inquiry and FERC alone is empowered to make it.

2. The court of appeals avoided an otherwise straightforward application of the preemption holdings in *Mississippi Power & Light Co.* and *Nantahala* by mistakenly relying on statements in the Court's recent abstention decision in *NOPSI*. The court of appeals stated:

> [W]e are convinced that the Court in *NOPSI* * * * did not believe the Council could not regulate NOPSI's activities in this regard. It said that nothing in the Council's order was directly or even indirectly foreclosed by prior preemption decisions.

Pet. App. 17A (citing *NOPSI*, 109 S. Ct. at 2517).

First, as even the court of appeals correctly recognized, in *NOPSI*, "the Court held only that the [Council's] order was not 'flagrantly' unlawful for *Younger* abstention purposes; it did not hold the facial preemption claim was foreclosed." Pet. App. 10A (citing *NOPSI*, 109 S. Ct. at 2517). For that reason alone, the Court's statements in *NOPSI* cannot bear the weight the court of appeals would have them carry. Second, the Court's crafting of a "facial preemption" inquiry in *NOPSI* for purposes of *Burford* abstention cannot fairly be construed to overturn—without any discussion—well-settled federal preemption doctrine. Such a construction may not stand particularly where, as here, the Court has recently reaffirmed that doctrine in a case involving the same FERC allocation order. See *Mississippi Power & Light Co.*, 487 U.S. at 369-377.

Finally, the "perfectly sensible" exception to FERC preemption the Court noted in *Nantahala*, 476 U.S. at 967-968, does not call for the court of appeals' construction of the Court's statements in *NOPSI*. See Pet. App. 17A-18A. In *Nantahala*, the Court observed that "an increase in FERC-approved wholesale rates need not lead to an increase in retail rates." 476 U.S. at 967. But as petitioner correctly explains, "[t]he reason for this rule is that a utility can experience offsetting 'cost savings in other areas' that FERC does not regulate." Pet. 16 n.14 (citing *Nantahala*, 476 U.S. at 968). In this case, the *Nantahala* exception is inapplicable, since the Council has acted in an area of exclusive federal concern—it barred NOPSI's recovery of costs that FERC regulated (and in fact found to be just and reasonable). Hence, the holding and rationale of this Court's decision in *Mississippi Power & Light Co.* are directly controlling here, and nothing in the Court's opinion in *NOPSI* suggests the contrary.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

LAWRENCE G. WALLACE
Deputy Solicitor General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

WILLIAM S. SCHERMAN
General Counsel

JEROME M. FEIT
Solicitor

TIMM L. ABENDROTH
Attorney
Federal Energy Regulatory Commission

FEBRUARY 1991

---

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1991 – 282 061/20371